Geo Win Sdn Bhd v CC Land Resources Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1080–07 OF 2023
SUPANG LIAN, AZIMAH OMAR JJCA AND WAN AHMAD FARID WAN SALLEH HCJ
12 SEPTEMBER 2024

Contract — Letter of undertaking — Breach of — Appellant refused to comply with terms of letter of undertaking — Respondents claimed for specific performance of letter of undertaking against appellant — Whether there was contravention against s 223 of Companies Act 2016 — Whether respondents had not complied with terms of letter of undertaking — Whether judicial commissioner correct in dismissing appellant's contention on forgery

The first respondent ie CC Land Resources Sdn Bhd ('CCL') was the landowner of a project land under a joint venture development agreement ('JVA') entered into with the appellant as the developer ie Geo Win Sdn Bhd ('GW'). Under the JVA, upon completion of the development of shophouses on the project land, CCL would be entitled to 20% development profit from the sale of the shop houses by GW. Upon a variation agreement, this 20% entitlement was later substituted to cash payments. Thus, the net effect of the JVA (with variation) was that CCL relinquished (while GW accepted) proprietary ownership or interest over the project land (with shop houses) while CCL shall be paid consideration in the form of cash payments. This transfer of proprietary rights over the shop-houses was further evinced by the execution of a power of attorney ('POA') by CCL to allow GW to deal with the shop houses. Additional or collateral to the JVA, a collateral letter of undertaking ('LOU') was also executed by both CCL and GW. Under the LOU, as part of the deal under the JVA, GW as developer undertook and promised to give one complimentary unit of double storey semi-D shophouse ('the complimentary unit') to CCL's nominee ie the second respondent as additional consideration to the JVA. To further solidify the terms of the LOU, CCL's board of directors issued a resolution to authorise or ratify the execution of the LOU. At the completion of the construction, 11 units had more than 38ft of frontage width. Only three units had very minute and negligible margin between 10cm to 30cm less than 38ft of frontage width. Considering the completion of the development, CCL requested to GW for compliance of the LOU and transfer of the complimentary unit to the second respondent as promised and agreed by GW. In breach of the LOU, GW refused to comply with the terms of the LOU citing that the LOU was void and unenforceable due to illegality; and the 14 shop houses did not meet the agreed specifications under the LOU. The respondents commenced an action at the High Court for

specific performance of the LOU against GW. GW raised the following reasons to avoid enforcement of the LOU: (a) the LOU was 'illegal' as it contravened s 221 of Companies Act 2016 ('CA') because the nominee's interest in the LOU was allegedly not declared to CCL's board of directors; (b) the LOU was 'illegal' as it contravened s 223 of the CA because the LOU was an agreement which substantially disposed CCL's property without any approval via CCL's resolution; (c) the development had not complied with the specifications prescribed under the LOU; and (d) the respondent's board of directors' resolution approving the LOU was a forgery. The learned judicial commissioner ('JC') had allowed the respondent's claim and ordered specific performance of the LOU against GW. Hence, this appeal. However, GW had abandoned and had not appealed on its contention under s 221 of the CA. The issues for consideration were: (i) whether there was a contravention against s 223 of the CA; (ii) whether the respondents had not complied with the terms of the LOU; and (iii) whether the JC was correct in dismissing GW's contention on forgery.

Held, dismissing the appeal:

(1) GW was not challenging the validity of the JVA and POA. Since GW was admitting to the validity of the JVA, then GW could not now contradict its own earlier admission and acquiescence as to the validity of the disposal of all 14 units under the JVA. Estoppel shall bar GW from relying on s 223 of the CA to renege on its own prior admission and agreement. Furthermore, s 223 of the CA should not apply as against the LOU because the LOU entailed GW's relinquishment of the complimentary unit, not the respondent. When the LOU was executed, it was GW's undertaking (not the respondent) that GW shall relinquish its proprietary right over the complimentary unit to the second respondent. Thus, the transfer of the complimentary unit from GW was not at all any disposal of CCL's property. Since the LOU entailed GW's (not CCL) promise and undertaking to transfer the complimentary unit to the second respondent, it was utterly irrefutable that s 223 of the CA did not apply as against the LOU (see paras 23–24 & 27).

(2) The rigid interpretation of the LOU by GW was a wrong interpretation which yielded a result that did not make any business or commercial common sense. It could not make good business common sense that GW could freely refuse to abide by the LOU when the party solely responsible for the development of the shop houses was GW itself. It was GW's decision to breach the LOU and build three out 14 units which were slightly non-compliant to the LOU's specification. No sane businessman of sound mind would intentionally enter into the LOU to allow GW to deprive him of the complimentary unit out of GW's own wilful default and breach against the LOU. It could not at all be said that the exceedingly insignificant margin between 10cm to 30cm would

render the three shop houses so dysfunctional and non-merchantable as a shop house. GW could not expect the court to deprive the second respondent of his proprietary entitlement under the LOU just because GW themselves decided to construct three of the units just 10cm to 30cm less than what was agreed under the LOU (see paras 28, 34, 37 & 45).

(3) The JC had properly at length deliberated on the conflicting handwriting expert evidence of both the parties' experts and preferred CCL's expert testimony. The JC had properly appreciated that the testimony of CCL's former director ('En Puteh') was tainted and non-credible as there were evidence of personal messages with GW's director that En Puteh had expressed that he was 'indebted' to GW's director for all of his past favours. The JC had appropriately identified that En Puteh was not at all a witness of truth and was willing to testify whatever falsities that GW would have him regurgitate (see paras 48–49).

[Bahasa Malaysia summary

Responden pertama iaitu CC Land Resources Sdn Bhd ('CCL') adalah pemilik tanah projek di bawah perjanjian pembangunan usaha sama ('JVA') yang dimeterai dengan perayu sebagai pemaju iaitu Geo Win Sdn Bhd ('GW'). Di bawah JVA, setelah pembangunan rumah kedai di tanah projek selesai, CCL akan berhak mendapat 20% keuntungan pembangunan daripada penjualan rumah kedai oleh GW. Melalui perjanjian variasi, hak 20% ini kemudiannya digantikan dengan pembayaran tunai. Oleh itu, kesan bersih JVA (dengan variasi) adalah bahawa CCL melepaskan (sementara GW menerima) pemilikan atau kepentingan hak milik ke atas tanah projek (dengan rumah kedai) sementara CCL akan dibayar dalam bentuk pembayaran tunai. Pemindahan hak milik ke atas rumah kedai ini selanjutnya dibuktikan dengan pelaksanaan surat kuasa wakil ('POA') oleh CCL untuk membolehkan GW menguruskan rumah kedai tersebut. Tambahan atau kolateral kepada JVA, surat aku janji kolateral ('LOU') juga dimeterai oleh kedua-dua CCL dan GW. Di bawah LOU, sebagai sebahagian daripada perjanjian di bawah JVA, GW sebagai pemaju berjanji untuk memberikan satu unit rumah kedai semi-D dua tingkat percuma ('unit percuma') kepada penama CCL iaitu responden kedua sebagai pertimbangan tambahan kepada JVA. Untuk mengukuhkan lagi syarat-syarat LOU, lembaga pengarah CCL mengeluarkan resolusi untuk membenarkan atau mengesahkan pelaksanaan LOU. Setelah pembangunan selesai, 11 unit mempunyai lebar hadapan lebih daripada 38 kaki. Hanya tiga unit mempunyai margin yang sangat kecil dan tidak ketara antara 10cm hingga 30cm kurang daripada lebar hadapan 38 kaki. Memandangkan pembangunan telah selesai, CCL meminta GW untuk mematuhi LOU dan memindahkan unit percuma kepada responden kedua seperti yang dijanjikan dan dipersetujui oleh GW. Dalam pelanggaran LOU, GW enggan mematuhi syarat-syarat

LOU dengan alasan bahawa LOU adalah tidak sah dan tidak boleh dikuatkuasakan kerana menyalahi undang-undang; dan 14 rumah kedai tidak memenuhi spesifikasi yang dipersetujui di bawah LOU. Responden memulakan tindakan di Mahkamah Tinggi untuk pelaksanaan spesifik LOU terhadap GW. GW mengemukakan alasan berikut untuk mengelakkan penguatkuasaan LOU: (a) LOU adalah 'tidak sah' kerana melanggar s 221 Akta Syarikat 2016 ('AS') kerana kepentingan penama dalam LOU didakwa tidak diisytiharkan kepada lembaga pengarah CCL; (b) LOU adalah 'tidak sah' kerana melanggar s 223 AS kerana LOU adalah perjanjian yang secara substansial melupuskan harta CCL tanpa sebarang kelulusan melalui resolusi CCL; (c) pembangunan tidak mematuhi spesifikasi yang ditetapkan di bawah LOU; dan (d) resolusi lembaga pengarah responden yang meluluskan LOU adalah pemalsuan. Pesuruhjaya kehakiman ('JC') yang bijaksana telah membenarkan tuntutan responden dan memerintahkan pelaksanaan spesifik LOU terhadap GW. Oleh itu, rayuan ini. Walau bagaimanapun, GW telah meninggalkan dan tidak merayu mengenai hujahnya di bawah s 221 AS. Isu-isu yang perlu dipertimbangkan adalah: (i) sama ada terdapat pelanggaran terhadap s 223 AS; (ii) sama ada responden tidak mematuhi syarat-syarat LOU; dan (iii) sama ada JC betul dalam menolak hujah GW mengenai pemalsuan.

Diputuskan, menolak rayuan:

(1) GW tidak mencabar kesahihan JVA dan POA. Oleh kerana GW mengakui kesahihan JVA, maka GW tidak boleh sekarang bercanggah dengan pengakuan dan persetujuan awalnya mengenai kesahihan pelupusan semua 14 unit di bawah JVA. Estopel akan menghalang GW daripada bergantung pada s 223 AS untuk mengingkari pengakuan dan persetujuan awalnya sendiri. Tambahan pula, s 223 AS tidak sepatutnya terpakai terhadap LOU kerana LOU melibatkan pelepasan unit percuma oleh GW, bukan responden. Apabila LOU dimeterai, ia adalah janji GW (bukan responden) bahawa GW akan melepaskan hak miliknya ke atas unit percuma kepada responden kedua. Oleh itu, pemindahan unit percuma daripada GW bukanlah pelupusan harta CCL. Oleh kerana LOU melibatkan janji dan ikrar GW (bukan CCL) untuk memindahkan unit percuma kepada responden kedua, adalah tidak dapat dipertikaikan bahawa s 223 AS tidak terpakai terhadap LOU (lihat perenggan 23–24 & 27).

(2) Tafsiran ketat LOU oleh GW adalah tafsiran yang salah yang menghasilkan keputusan yang tidak masuk akal dari segi perniagaan atau komersial. Tidak masuk akal dari segi perniagaan bahawa GW boleh dengan bebas enggan mematuhi LOU apabila pihak yang bertanggungjawab sepenuhnya untuk pembangunan rumah kedai adalah GW sendiri. Ia adalah keputusan GW untuk melanggar LOU dan membina tiga daripada 14 unit yang sedikit tidak mematuhi

spesifikasi LOU. Tiada ahli perniagaan yang waras akan sengaja memasuki LOU untuk membenarkan GW menghalangnya daripada mendapatkan unit percuma akibat daripada kesalahan dan pelanggaran GW sendiri terhadap LOU. Tidak boleh dikatakan bahawa margin yang sangat tidak ketara antara 10cm hingga 30cm akan menjadikan tiga rumah kedai tersebut tidak berfungsi dan tidak boleh dijual sebagai rumah kedai. GW tidak boleh mengharapkan mahkamah untuk menghalang responden kedua daripada mendapatkan hak miliknya di bawah LOU hanya kerana GW sendiri memutuskan untuk membina tiga unit tersebut hanya 10cm hingga 30cm kurang daripada apa yang dipersetujui di bawah LOU (lihat perenggan 28, 34, 37 & 45).

(3) JC telah dengan betul mempertimbangkan bukti pakar tulisan tangan yang bercanggah daripada pakar kedua-dua pihak dan memilih keterangan pakar CCL. JC telah dengan betul menghargai bahawa keterangan bekas pengarah CCL ('En Puteh') adalah tercemar dan tidak boleh dipercayai kerana terdapat keterangan mesej peribadi dengan pengarah GW bahawa En Puteh telah menyatakan bahawa dia 'berhutang budi' kepada pengarah GW untuk semua kebaikan masa lalunya. JC telah dengan tepat mengenal pasti bahawa En Puteh bukanlah saksi benar dan bersedia untuk memberi keterangan apa sahaja kepalsuan yang GW mahu katakan (lihat perenggan 48–49).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals [2012] 1 MLJ 761; [2012] 2 CLJ 16, CA (refd)

Ho Yau Hong & Ors v How Yaw Ming and another appeal [2023] MLJU 933, CA (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489, CA (refd)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)

Prenn v Simmonds [1971] 3 All ER 23, HL (folld)

Samado Sdn Bhd v Kerajaan Malaysia [2020] MLJU 274, HC (folld)

Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd [1994] 2 MLJ 770, SC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 132C
Companies Act 2016 ss 221, 221(10), 223, 223(1)(b)

Appeal from: *CC Land Resources Sdn Bhd & Anor v Geo Win Sdn Bhd* [2023] MLJU 1394 (High Court, Kuala Lumpur)

Jack Yow Pit Pin (with Jasmine Goh) (Rahmat Lim & Partners) for the appellant. Leong Sher-How (with Corina Koh Pei Ling) (Leong & Partners) for the respondents.

Azimah Omar JCA:

A. BRIEF FACTS

[1] The appeal before us is a claim for specific performance of a letter of undertaking as a collateral agreement to a larger joint venture agreement upon the completion of the development under the contracts.

[2] The first respondent, CC Land Resources Sdn Bhd ('CCL') was the landowner of some 2.5 acres of project land under a joint venture development agreement dated 6 April 2016 ('JVA') entered into with the appellant-developer, Geo Win Sdn Bhd ('GW').

[3] Under the JVA, upon completion of the development of shop-houses on the project land, CCL will be entitled to 20% development profit from the sale of the shop houses by GW. Upon a variation agreement, this 20% entitlement was later substituted to cash payments. Thus, the net effect of the JVA (with variation) was that CCL relinquishes (while GW accepts) proprietary ownership or interest over the project land (with shop houses) while CCL shall be paid consideration in the form of cash payments. This transfer of proprietary rights over the shop-houses was further evinced by the execution of a power of attorney by CCL to allow GW to deal with the shop houses.

[4] Additional or collateral to the JVA, a collateral letter of undertaking ('LOU') was also executed by both CCL and GW. Under the LOU, as part of the deal under the JVA, GW as developer undertook and promised to give *one complimentary unit of double storey semi-D shop- house ('complimentary unit') to CCL's nominee* (Sha Chaim Chuan), second respondent as additional consideration to the JVA. The general condition to the LOU was that the development must consist of either:

(a) (If frontage *OF ALL UNITS* does *NOT EXCEED 38 feet*) 16 units of shop-houses which were *approved for development by the authorities*; or

(b) (If frontage of *SOME UNITS DOES EXCEED* 38 feet) any approved number of shop houses approved by the authorities.

[5] The LOU was negotiated, prepared, and executed between each parties' respective solicitors (at that time). To further solidify the terms of the LOU, the first respondent's Board of Directors issued a resolution circa October 2019 to authorise or ratify the execution of the LOU.

[6] In furtherance to the JVA and LOU, there were two planning permissions approved by Jabatan Perancangan Pembangunan Majlis Perbandaran Bentong. The first approved plan on 6 October 2017 comprised of 16 units of semi-detached shop houses. There was a variation leading up to the second approved plan on 8 October 2019 which thereafter the project comprises of 12 semi-detached shop houses and two bungalows.

[7] In line with the agreed LOU, there was a clear whatsapp communication between CCL's nominee (second respondent) and the appellant's director (DW3) circa 2019 where the appellant has explicitly acknowledged and admitted the second respondent's selection of the complimentary unit based off of the approved plans.

[8] The construction of the 14 shop houses under the second approved plan proceeded and was completed without any event. At the completion of the construction, 11 units had more than 38 feet of frontage width. Only three units had *very minute and negligible margin* between 10cm to 30cm (or 0.3 to 1.01 feet) less than 38 feet of frontage width.

[9] All the parties (especially the appellant) was well aware of the binding force of the LOU and had never at any time protested or complained of any illegality against the LOU. Despite the tgree units' minute and negligible margin of difference, the appellant had never raised any objections against the LOU during the entire period of development from the instance of the second approved plan until completion of development.

[10] Considering the completion of the development (*and the appellant's acquiescence to the minute and negligible margin*), the first respondent circa march 2020 wrote to the appellant requesting for compliance of the LOU and transfer of the complimentary unit to the second respondent as promised and agreed by the appellant.

[11] In breach of the LOU, the appellant *for the first time ever* (despite years of acquiescence) had put on record its refusal to comply with the terms of the LOU via a letter dated 24 June 2020. The appellant suddenly cited that:

(a) the LOU is void and unenforceable due to illegality; and

(b) the 14 shop houses did not meet the agreed specifications under the LOU.

[12] Circa August 2020, the respondents commenced an action at the High Court for specific performance of the LOU against the appellant. Only upon the commencement of the suit that the appellant for the first time raised the following reasons to avoid enforcement of the LOU:

(a) the LOU was 'illegal' as it contravenes s 221 of Companies Act because the nominee's interest in the LOU was allegedly not declared to CCL's Board of Directors;

(b) the LOU was 'illegal' as it contravenes s 223 of the Companies Act because the LOU was an agreement which substantially disposes CCL's property without any approval via CCL's resolution;

(c) the development had not complied with the specifications prescribed under the LOU; and

(d) the respondent's Board of Directors' Resolution approving the LOU was a forgery.

[13] After a full-trial hearing, the learned judicial commissioner ('learned JC') had allowed the respondent's claim and ordered specific performance of the LOU against the appellant. The learned JC had also ordered that the appellant to pay the first respondent costs of RM50,000, subject to allocator.

B. THE APPEAL BEFORE US

[14] Dissatisfied with the learned JC's decision, the appellant filed the present appeal before us. In its memorandum of appeal (encl 3), the appellant had set out 12 grounds in challenging the learned JC's decision which essentially revolves around the interpretation of cl 1(b)(i)(aa), cl 1(b)(i)(bb) of the LOU, alleged forgery, and the illegality of LOU against s 223 of the Companies Act 2016.

[15] However, this court must emphasise that despite setting out 12 grounds to complain against the learned JC's decision. the appellant *has abandoned (and had not appealed on) its contention under s 221 of the Companies Act 2016*. Apart from the clear abandonment, the appellant remained resolute on its stance positing contravention of s 223 of the Companies Act 2016 and the alleged non-compliance of the specifications prescribed under the LOU.

B(i) Whether there was a contravention against s 221 of the Companies Act 2016

[16] From the outset it was clear that ss 221 and 223 of the Companies Act 2016 are primarily *internal safeguards for COMPANY (or its SHAREHOLDERS) against director's abuse of power and position*.

[17] The appellant was a stranger to the company. Even CCL as a company had not internally complained of any illegality against the LOU. There's no basis at all for the appellant to complain considering CCL itself never mounted any complaint against any of its directors. Section 221 of the Companies Act 2016 reads:

> 221 (1) Subject to this section, every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall, as soon as practicable after the relevant facts have come to the director's knowledge, declare the nature of his interest at a meeting of the board of directors.

[18] It was clear that the appellant's contention under s 221 of the Companies Act 2016 was an afterthought and without basis. Neither any other shareholder nor CCL itself as a company had ever mounted any action or complaint against any of CCL's director of an alleged undisclosed interest regarding the LOU (and the complimentary unit to be transferred to the second respondent).

[19] The learned JC was also correct in finding that even if there was any contravention against s 221 of the Companies Act 2016 (although there was none), under s 221(10) of the Companies Act 2016, *the LOU was VOIDABLE not VOID at the option of CCL AND NOT THE APPELLANT AS OUTSIDER*:

> (10) A contract entered into in contravention of this section *shall be VOIDABLE AT THE INSTANCE OF THE COMPANY* except if it is in favour of any person dealing with the company for any valuable consideration and without any actual notice of the contravention.

[20] Since CCL itself seeks to specifically enforce the LOU, then even if s 221 of the Companies Act 2016 was breached, CCL had elected to continue with the LOU. Furthermore, the only other person who can render the LOU to be voidable *would be the second respondent* as he would be within the class of persons that the LOU 'is in favour of any person dealing with the company'. The LOU clearly was in favour of the second respondent as it seeks to bequeath the second respondent his rightful proprietary rights over the complimentary unit. The LOU was *never in favour of the appellant* as the appellant was the party that agreed and must relinquish the complimentary unit to the second respondent.

[21] In any case, since the appellant had not raised any challenge against the learned JC's findings on s 221 of the Companies Act 2016, it shows that the appellant admits to the correctness of the learned JC's analysis and now should be barred from denying the same.

B(ii) Whether there was a contravention against s 223 of the Companies Act 2016

[22] A reading of s 223(1)(b) of the Companies Act 2016 would be more than sufficient to reveal the appellant's error and misconceived reliance on the provision. Section 223(1)(b) of the Companies Act 2016 reads:

223 Approval of company required for disposal by directors of company's undertaking or property

(1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for —

(b) the disposal of a substantial portion of the company's undertaking or property unless —

(i) the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or

(ii) the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution.

[23] From a plain reading of the provision above, it is clear that the provision does not at all apply as against the LOU. It must be remembered that the *appellant IS NOT CHALLENGING the validity of the JVA and power of attorney*. It must also be remembered that it is the JVA that seeks to dispose a 'substantial portion' of CCL's property (being ALL OF THE 14 units of shop houses). Thus, since the appellant is admitting to the validity of the JVA, then the appellant cannot now contradict its own earlier admission and acquiescence as to the validity of the disposal of all 14 units under the JVA to the appellant. Estoppel shall bar the appellant from relying on s 223 of the Companies Act 2016 to renege on its own prior admission and agreement (see *Ho Yau Hong & Ors v How Yaw Ming and another appeal* [2023] MLJU 933; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; and *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16).

[24] Furthermore, as stated earlier, s 223 of the Companies Act 2016 should not apply as against the LOU simply because:

(a) the LOU entails *THE APPELLANT'S RELINQUISHMENT* of the complimentary unit, *NOT THE RESPONDENT — company*. It must be borne in mind that upon the JVA, POA, and variation agreement, all of the 14 units (inclusive of the complimentary unit) were relinquished to the proprietorship rights OF THE APPELLANT. Thus, when the LOU was executed, it was *THE APPELLANT'S UNDERTAKING (not the respondent)* that the appellant shall relinquish its proprietary right over the complimentary unit to the second respondent. Thus, the transfer of the complimentary unit from the appellant was not at all any disposal of the first respondent's property. This was conceded and was readily admitted by the defendant's director (DW3) himself during cross-examination (where he clearly admitted that the first respondent had no rights to sell or deal with any of the shop houses); and

(b) even if we were to follow the appellant's interpretation and application of the provision, the singular complimentary unit was by an overwhelming margin NOT A SUBSTANTIAL PORTION out of the whole 14 units of shop houses. Mathematically speaking, the whole of 14 units was estimated to value at RM1.5m each (being RM21m total in asset value). The singular complimentary unit at RM1.5m *only accounts for a measly SEVEN PERCENTUM (7%) from the total asset value*.

[25] The appellant tried to 'inversely' apply the Court of Appeal decision in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616. The misplaced inversed application was that in *Pioneer Haven*, the Court of Appeal found that s 132C of the old Companies Act 1965 (now s 223 of the Companies Act 2016) was inapplicable as under a JVA, the landowner did not divest or relinquish its proprietary rights over the project land to the developer.

[26] The appellant thus misguidedly argue that s 223 of the Companies Act 2016 must apply here because the JVA, POA, and variation agreement effectually transferred beneficial and proprietary rights over the 14 units to the appellant. However, this entire argument totally fails considering the fact that *THE APPELLANT IS NOT INVALIDATING THE JVA*. In fact, the appellant remains fully agreeable to the development under the JVA. Thus, the appellant's application of the case of *Pioneer Haven* was totally devoid of coherence, consistency, and logic. It was illogical and incoherent for the appellant to fully accept and acknowledge the transfer of the 14 units (inclusive of the complimentary unit) but at the same time lean on the provision and the case of *Pioneer Haven* to invalidate the same.

[27] What the appellant was actually seeking to invalidate was only the LOU. And since the LOU entailed the appellant's (not CCL) promise and undertaking to transfer the Complimentary Unit to the second respondent, it is utterly irrefutable that s 223 of the Companies Act 2016 does not apply as against the LOU.

B(iii) Whether the respondents have not complied with the terms of the LOU

[28] It is obvious that the rigid interpretation of the LOU by the appellant was a wrong interpretation which yields a result that does not make any business or commercial common sense. The appellant sought to strictly interpret the following specification set under the LOU in cl 1(b)(i) of the LOU:

... we Geo Win ... *hereby irrevocably agree and undertake* to:

...

A b) deliver, convey or transfer one (1) complimentary double storey semi-D shop ('the Unit') to Sha Chaim Chuan ... (Transferee) subject to the following terms and conditions:

...

B (i) the Unit will be granted to the Transferee in the event:

... (aa) sixteen (16) or more unit of shops, each of which has a maximum front width of 38 feet, *are capable of being approved or are approved by the Appropriate Authorities on the Project of the said Land; OR*

(bb) the Defendant decides to develop or has developed the commercial shops C with shoplot front width *exceeding 38 feet (i.e more than 38 feet)*

[29] The appellant is seeking to escape from the LOU merely because three out of the 14 units had just slightly less (*minute and negligible margin* between 10cm to 30cm (or 0.3 to 1.01 feet) than 38 feet of front width. The majority D remainder of 11 units indeed had front width exceeding 38 feet. Now, this rigid interpretation of the cl defeats business common sense for the following reasons:

(a) it would allow and even incentivise the appellant (as Developer) to abuse E and stake its own intentional breach of the LOU as a ground to unfairly escape the performance of the appellant's promise under the LOU and unjustly deprive the second respondent off of its entitlement over the complimentary unit;

F (b) the true genesis of the clause was in actuality to *secure the proper approval for development by the authorities*; and

(c) the LOU does not involve subjects which require strict accuracy and extreme precision to the extent that the *de minimis* principle could not apply.

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[30] The business common sense approach of interpretation was first proffered by the House of Lords in the landmark case of *Prenn v Simmonds* [1971] 3 All ER 23. Briefly, the defendant in the *Prenn* had sought to insist on a strict literal interpretation of a contract which inevitably leads to a H circumstance where *the plaintiff's fate would unjustly be at the mercy of the defendant's manipulation and would not incentivise the plaintiff to properly perform a contract (because the plaintiff's due performance of that contract could still put the plaintiff at a loss upon the defendant's manipulation)*.

I **[31]** Basically, in Prenn, the plaintiff entered into an agreement to purchase shares of a holding company. The holding company does not trade or engage in business of its own. The plaintiff was also an employee in one of the subsidiaries of the holding company. It was agreed that a portion of the share price can be paid from the profits of the holding company.

[32] The subsidiaries of the holding company indeed had turned a profit (and the holding company as a collective had also turned a profit). Thus, the plaintiff sought to claim the remainder shares he was owed as he had paid the share price from the profits generated by the holding company's group of companies as a whole. However, the holding company refused to release the remainder shares on the supposition that the 'profits of the holding company' can only mean profits solely generated by the holding company.

[33] The defendant's interpretation in Prenn's did not yield to business common sense simply because:

(a) the holding company does not trade or conduct its own business and was unable to generate its own income or profit. Thus, it was always reliant on its subsidiaries to make money;

(b) the plaintiff would unjustly be held hostage at the defendant's mercy as the defendant as holding company had free rein to move monies throughout the entire group of companies and make it as though that the holding company does not turn a profit; and

(c) the plaintiff would be demoralised from performing his duties as an employee in the subsidiary company as his good performance can be negated by the holding company's manipulation of cash flow in between all subsidiaries within the group of companies.

[34] Applying *Prenn* in the case before us, it cannot make good business common sense that the appellant can freely refuse to abide by the LOU when the party solely responsible for the development of the shop houses was the appellant itself. The sole party that was empowered and entrusted to abide by the specifications under the LOU was the appellant itself. The respondents had no control whatsoever on the manner and method in which the appellant intends to develop the shop houses despite the appellant being in breach of the LOU. It was the appellant's decision to breach the LOU and build three out 14 units which were slightly non-compliant to the LOU's specification.

[35] Alike in *Prenn*, the appellant here as developer had free rein as to how the shop houses will be constructed. If we were to follow the appellant's senseless interpretation, then the respondents' interest would unjustly be held hostage at the mercy and whims of the appellant. How can it make any business common sense that the respondent would willingly agree to a term that the *RESPONDENTS AGREE TO BE AT A LOSS* when *THE PARTY IN BREACH WAS THE APPELLANT*? The simple answer is that such interpretation could not make any business common sense.

[36] The Federal Court had also shared the same sentiment in the case of *Seet Chuan Seng & Anor v Tee Yih Jia Foods Manufacturing Pte Ltd* [1994] 2 MLJ

770:

> *In this case, we would also assert that no businessman, who had not taken leave of his senses, would intentionally enter into an agreement which exposed him to unfair trading* and the kind which is actionable in a passing off action. We would also adopt the same reasoning to say that we should not manipulate the contractual word 'competition' used in cl 5 to say that the appellants cannot be restrained from unfair competition. We would also quote and adopt the following words of Lord Diplock in yet another recent case of *Antaios Compania Naviera SA v Salen Rederierna AB:11*
>
> *... if detailed* semantic *and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.* (Emphasis added.)

[37] Applying the ratio decidendi above, we also find that no sane businessman of sound mind would intentionally enter into the LOU to allow the appellant to deprive him of the complimentary unit out of the appellant's own wilful default and breach against the LOU.

[38] This falls squarely in line with a principle of equal importance in that no party can stake its own delinquency or breach as a basis for a claim or even defence. We refer to the salutary words of Gopal Sri Ram JCA (as His Lordship then was) in the case of *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489:

> *there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application,* it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: *a party ought not to be permitted to take advantage if his own breach.* See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1. (Emphasis added.)

[39] The party solely responsible to develop the shop houses was the appellant. If there was any shortfall from the specifications agreed, that shortfall must pure and solely be the appellant's willful default. It was thoroughly unjust that the appellant now seeks to 'punish' the respondent (by depriving him of the complimentary unit) for the appellant's own error and fault.

[40] In any case, looking at the clause in its entirety, it is clear that the true genesis of the clause would be as follows:

(a) *if the state authority approves* a plan for units that has a *MAXIMUM frontage width of 38 feet* (or less), then the appellant as Developer must construct a minimum of 16 units; or

(b) if the state authority approves a plan for units that has a *frontage width EXCEEDING 38 feet* (or less), then the appellant as Developer can

construct any number of units less than 16 units. A

[41] Thus, the salient features of the clause were that the units must be approved by the state authority and that the appellant may construct less than 16 units of shop houses in case the approved plan entailed units that has frontage width exceeding 38 feet. It was never designed to unjustly deprive the second respondent from the complimentary unit at the appellant's whims and mercy. It only entailed that the appellant must construct 16 units if the state authority approves a plan for 16 units with maximum 38 feet frontage width or less. B C

[42] *It remains a constant and unchanged that the complimentary unit shall be relinquished to the second respondent* in both circumstances that either 16 units (with 38 feet maximum frontage width) or 14 units (with frontage width exceeding 38 feet) were developed. And that was exactly what transpired in this case. The second approved plan allows for the development of a total of 14 units (while 11 out of the 14 units have frontages width exceeding 38 feet). Despite the lesser amount of units under the second approved plan, *the appellant had never raised any issue against the JVA or even against the continued enforceability of the LOU*. Only much later after the completion of development that the appellant suddenly took a u-turn and negated its own years of prior admission and acquiescence (which estoppel shall apply to bar the appellant from doing so). D E

[43] Now, even if we were wrong (and should follow the appellant's strict insistence on the specifications under the LOU), the exceedingly small, minute, and insignificant margin of between 10cm to 30cm (or 0.3 to 1.01 feet) shall fall within the acceptable margins of the de minimis principle. The court ought not take action against a margin that was so insignificant that it was merely trifling. It must be kept in mind that the development of shop houses is not exactly a development that is extensively technical requiring extreme precision so as to enable the shop house to 'function' as a shop house. In fact, the *de minimis* principle had been applied in the instance of the construction, equipping, and commissioning of a health clinic (a development far more technically critical than that of a mere shop house). F G H

[44] We refer to the case of *Samado Sdn Bhd v Kerajaan Malaysia* [2020] MLJU 274 in which the court had applied the *de minimis* principle in a construction dispute: I

> [45] As regards the extensive usage of the expression 'practical completion' rather than 'completion' in construction contracts, Teng Kam Wah at the same page of his book attributes this as being '[1.031] ... *due to the fact that a building can seldom if ever, be built in full and complete compliance with the drawings and specifications.* The almost inevitability of defects especially for substantial construction works has

fuelled the popular use of *the certificate of practical completion which may be issued where the defects are of a DE MINIMIS nature but the completed building is nevertheless functional for its intended purpose thus not precluding the contractor from delivering it to the employer.*'. Chow Kok Fong, also at the same page of his book, states it this way: '9.069 In most construction contracts, the *works are considered to be completed when it is in a state which can be handed over to the employer to be adequately used for the purpose for which the works were commissioned.* (Emphasis added.)

[45] Applying the above in the case before us, it cannot at all be said that the exceedingly insignificant margin between 10cm to 30cm (which is just about the length of a regular and typical rulers used in schools) would render the three shop houses so dysfunctional and non-merchantable as a shop house. Surely the appellant cannot expect the court to deprive the second respondent of his proprietary entitlement under the LOU just because the appellant themselves decided to construct three of the units just 10cm to 30cm less than what was agreed under the LOU. The absurdity of the appellant's supposition is certainly glaring.

B(iv) Whether the learned JC was correct in dismissing the appellant's contention on forgery

[46] Considering our findings in headings B(i) and B(ii) above, the entire contention on forgery of the first respondent's Board of Director's Resolution becomes completely moot. This was simply because the LOU does not at all trigger either ss 221 and 223 of the Companies Act 2016 (and thus, a Board of Director's Resolution was essentially not required).

[47] Nonetheless we shall only briefly allude to this contention by the appellant. The appellant's last-ditch attempt at invalidating the LOU was seeking to prove that the first respondent Board of Directors' resolution was tainted by the forgery of one of a former Director's signature (Encik Puteh).

[48] We agree that the learned JC had properly at length deliberated on the conflicting handwriting expert evidence of both the parties' experts and preferred CCL's expert testimony. There is no reason for us to disturb the learned JC's finding of fact when the learned JC had given extensive reasoning and justification as to the court's preference of expert testimony. The learned JC properly appreciated that CCL's expert utilised a fairer scientific examination of the signatures by *identifying the core features* of Encik Puteh's signature (especially considering En Puteh was a 'variable writer' with ever changing signatures. Even the appellant's expert agreed that Encik Puteh was a variable writer but only focused on the differences between signatures (a focus which was not at all helpful in a case of a variable writer).

[49] We also find that the learned JC had properly appreciated that the testimony of CCL's former director (Encik Puteh) was tainted and non-credible as there were evidence of personal messages with the appellant's director that Encik Puteh had expressed that he was 'indebted' to the appellant's director for all of his past favors ('tolong'). Encik Puteh clearly expressed to the appellant's director that he was willing to do anything as the appellant's director wants him to do ('Untuk Mr Tan dan Mr Leong saya akan tolong apa cara sekalipun don't worry ckp saja apa yang perlu saya buat'). The learned JC had appropriately identified that Encik Puteh was not at all a witness of truth, and was willing to testify whatever falsities that the appellant would have him regurgitate.

C. THIS COURT'S DECISION

[50] All the aforementioned deliberations considered, we hereby dismiss this appeal. The learned judge's decision to allow the respondent' claim is thereby affirmed and maintained.

[51] This court accordingly orders that the appellant pays costs of RM30,000 here to the first and second respondents, subject to allocator.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh